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No. 93-841

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE CITY OF NEW YORK, *et al.*,

Petitioners,

-against-

THE HERTZ CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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January 21, 1994

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PETITIONERS' REPLY BRIEF

The fundamental flaw throughout Hertz's opposition brief is that it ignores the fact that the essential attribute of an impermissible hybrid restraint is governmental creation of an anticompetitive legal framework that is used by private actors to make or enforce their own anticompetitive decisions. Hertz avoids the fact that Int. No. 71-A creates no such framework by incorrectly analogizing the ordinance to statutes that provide legal cover for price-fixing decisions made by private parties, with no government supervision. *See, e.g.*, Brief for the Respondent in Opposition at 5 (hereinafter "Hertz Br.").

Relying on *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), Hertz makes the sweeping argument that any local regulation touching on price is an impermissible hybrid restraint unless "the government [sets] the mandated price and [reviews] the reasonableness of the price set." Hertz Br. at 5. While this might be an accurate statement regarding legislation that directly regulates the level of prices, even the Court of Appeals acknowledged that Int. No. 71-A is not "classic price-setting" such as was involved in *324 Liquor Corp.*, *Midcal*, and *Schwegmann*, and "does not purport to authorize price-setting by private industry." *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993).

Contrary to Hertz's implication, *Midcal*, *Schwegmann*, and *324 Liquor Corp.* did not hold that government must regulate totally or not at all. The antitrust violation in those cases was allowing private parties to set prices that government then fixed for them through statutes and regulations. That was also the flaw in the regulatory scheme in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988). The common element in those cases is that the offending statutes and regulations improperly allowed private concerns "to maintain retail prices at artificially high levels." *324 Liquor*, 479 U.S. at 340.

Int. No. 71-A is a directive to businesses, not an authorization for businesses to make anticompetitive decisions of their own. Private businesses do not "[make] the operative decisions regarding the challenged anticompetitive conduct."

Municipal Utilities Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1503 (11th Cir. 1991). In Int. No. 71-A, the "challenged anticompetitive conduct," prohibition of residence-based pricing, is imposed unilaterally by the ordinance itself, a point acknowledged by the Court of Appeals when it called the ordinance "simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structure." *Hertz Corp.*, 1 F.3d at 127. The fact that the ordinance does not include total government control over prices is simply not significant, and the Court of Appeals erred when it applied this element of the unilateral/hybrid test for price control legislation to an enactment involving a concededly different economic restraint.

Hertz tries to avoid the conflict between the reasoning of the Court of Appeals in this case and the incompatible holdings in *Alabama Power*, quoted above, and *Schwegmann Giant Super Markets v. Edwards*, 552 So. 2d 1241 (La. App. 1989), *writ denied*, 556 So. 2d 1280 (La.), *cert. denied*, 496 U.S. 938 (1990), Petition for Certiorari at 18, by disparaging *Alabama Power* and *Edwards* as state action immunity decisions that addressed unilateral vs. hybrid restraints merely as part of a discussion of the active supervision portion of the state action immunity test. *See* Hertz Br. at 13. As explained in the petition, this characterization does nothing to detract from the force of the holdings in those cases. *See* Petition for Writ of Certiorari at 18 n. 7.[1]

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[1]Hertz incorrectly claims that petitioners are maintaining that *Fisher v. City of Berkeley*, 475 U.S. 260 (1987), treated state action immunity and the unilateral vs. hybrid distinction as identical questions. *See* Hertz Br.

(continued...)

Nor should the absence of finality deter this Court from granting the petition. The antitrust claim addressed in the petition is the only cause of action in Hertz's complaint that was upheld by the Court of Appeals.[2] A writ of certiorari is warranted now because the issue presented is a pure question of law that will not be sharpened by a factual record, *see Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting), and ultimate reversal of the Court of Appeals by this Court would render meaningless the District Court proceedings contemplated by the Court of Appeals. In short, the question presented by the petition warrants review both because it raises an important issue of antitrust law and is "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947). As petitioners and amicus, the City of Boston, have explained, left unreviewed pending further

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[1](...continued)
at 13 n. 10. Petitioners made no such claim. What petitioners did say is that *Fisher* used principles first articulated in state action immunity cases to explain the difference between unilateral and hybrid restraints, and, therefore, cases discussing the adequacy of government supervision in state action immunity cases are relevant to the question of whether governmental action is unilateral or hybrid. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 506-08 (1987).

[2]Hertz says that its Commerce Clause claim was "reinstated" by the Court of Appeals, Hertz Br. at 2 n. 3, but that claim, like all others except the antitrust claim, was found legally insufficient. *See Hertz Corp.*, 1 F.3d at 131-32. The Court of Appeals gave Hertz a second chance to plead a valid Commerce Clause claim only because it remanded the Sherman Act cause of action. *Id.* at 132.

proceedings, the Court of Appeals' decision will place a cloud over a host of municipal regulatory efforts never intended to be brought within the ambit of the antitrust laws. *See* Petition for Writ of Certiorari at 25-27; Brief in Support of Petition for a Writ of Certiorari at 2-3.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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